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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 415.

FOREMAN'S ASSOCIATION OF AMERICA, *Petitioner*,

v.

EDWARD G. BUDD MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD, *Respondents*.

REPLY BRIEF FOR PETITIONER.

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Pursuant to paragraph 4(a) of Rule 38 of the Rules of this Court, petitioner submits this Reply Brief in Reply to the Briefs in Opposition filed by the National Labor Relations Board and Edward G. Budd Manufacturing Company, Respondents.

I.

Both the Board (Board's Brief p. 4, ftn. 1, p. 5) and the Company (Company's Brief p. 26) take the position that petitioner's petition for certiorari in *Foreman's Association of America* v. *L. A. Young Spring and Wire Corp.*, which was denied in 333 U. S. 837, raised questions which are substantially similar to those presented by the petition herein and were disposed of by this Court adversely to petitioner. This position is unfounded.

The *L. A. Young* case involved an order of the Board entered under the National Labor Relations Act of 1935 which directed the Young Company to cease and desist from refusing to bargain collectively with the Foreman's Association of America. As a corollary to this order of cessation, and without any other independent grounds, the Board ordered the Company to cease and desist from interfering with, restraining and coercing its employees in the exercise of their rights under Section 7 of the original Act. The case before the Board thus involved only the collective bargaining provisions of the original act and required the respondent not merely to refrain from illegal acts but to meet and take affirmative action with respect to bargaining with the Association.

The Young Company petitioned the United States Court of Appeals for the District of Columbia to review and set aside the Board's order and the Board cross-petitioned for enforcement. After the case was orally argued by the Board and Company, the amended act became effective, and that Court, on the strength of the intervening legislation but without further argument or briefs on its effect or validity, entered its judgment denying enforcement of the Board's Order. (163 F. 2d 905) The Association then moved that Court for leave to intervene and for rehearing. The court denied this motion.

The Association then petitioned this court for writ of certiorari to review the order denying the motion for leave to intervene and to review the judgment of the Court of Appeals. The Association's principal contention, and the only point advanced in its statement of the reasons for granting the writ, was that the order denying the motion to intervene constituted an abuse of discretion, reversal of which was necessary for the preservation of this Court's appellate jurisdiction over the remaining questions presented, but not argued, by the petition. (Petition in No. 502, October Term, 1947, pp. 7-12)

In the case at bar, the order of the Board in question does not involve the collective bargaining provisions of either the original or the amended act, but is grounded on a discriminatory discharge and independent findings of interference, restraint and coercion. The Sixth Circuit upheld these findings, enforced the correlative cease and desist provisions of the Board's Order and granted the Association's motion for leave to intervene. In its Order of December 15, 1947 (332 U. S. 840), on the Company's petition for writ of certiorari, this Court granted the petition of the Association to intervene, which raised the question of the unconstitutionality of the amended act, as related to supervisory employees; granted certiorari; and remanded to the cause to the Sixth Circuit for consideration of the effect of the Labor Management Relations Act on the validity of that part of the Order of the Board which directed the Company to cease and desist from discouraging membership in the Association.

The *Young* case, therefore, differs from the case at bar in respect to (1) the sections of the original and amended acts involved under the Board's order of cessation; (2) the standing of the Association which was denied intervention in the Court of Appeals for the District of Columbia in the *Young* case but granted intervention by the Sixth Circuit and by this Court in this case; (3) the nature of the questions presented and argued on the petition in the *Young* case, which was principally concerned with the question of intervention, and the questions presented and argued in the petition in this case, which directly raises the constitutional issues involved in the applicable sections of the amended act; and (4) the opinion of the Court of Appeals in the *Young* case, which was written without the benefit of briefs or argument on the validity of the applicable sections of the amended act, and the opinion of the Sixth Circuit in the case at bar, which, pursuant to grant of certiorari and specific remand from this Court, undertakes to construe the constitutionality of these sections.

The denial of the petition for writ of certiorari in the *Young* case does not import any expression of opinion on the merits of the questions presented. *Sunal* v. *Large,* 332 U. S. 184. *A fortiorari,* where, as here, the questions presented are so substantially different, and arise under such different conditions from those involved in the *Young* case, the denial of certiorari in that case is wholly without effect as precedent.

The Board further contends that the provisions of the amended act with respect to supervisors were also considered in *National Labor Relations Board* v. *Brown and Sharpe Mfg. Co.,* 169 F. 2d 331 (C. C. A. 1) which impliedly upheld the constitutionality of these sections. The *Brown and Sharpe* case involved an order of the Board, issued under the original act, requiring the Company to bargain with representatives of "time study" men, excluding supervisors. The Board sought enforcement of its Order, after the enactment of the amended Act. The court held that the "time study" men were not "supervisors" within the meaning of Sections 2(3) and (11) of the amended act, but remanded the case to the Board to make findings and reach conclusions with reference to the situation under the amended act. The Court did not consider the constitutionality of Sections 2(3) and 2(11), and did not even refer to Section 14(a) of the amended act, which is the gravamen of the petition for certiorari in the case at bar.

II.

Section 14(a) of the amended act provides that ". . . no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining". Petitioner contends that this section deprives not only the Board but all state agencies, including the state labor relations boards, and all courts, including the federal district courts, of jurisdiction to remedy violations of the constitutionally protected and legislatively

guaranteed rights of supervisors to self organization and that such a complete deprivation of remedy for such rights constitutes a denial of due process. (Petition pp. 9-17)

Without controverting petitioner's interpretation of Section 14(a), the Board contends merely that the question of the validity of this section is not properly before this Court, because the decree below was a remedy provided in the original act and "whether Congress could or could not constitutionally deprive state or federal courts of power to protect foremen in the exercise of their right to organize and bargain collectively cannot be decided in this case." (Gov't Brief pp. 5-6). The Board therefore denies the applicability of such cases as *Brinckerhoff-Faris Trust and Sav. Co.* v. *Hill,* 281 U. S. 673, 682 and *Truax* v. *Corrigan,* 257 U. S. 312, 330, 332, cited by petitioner in support of its contention. (Gov't Brief pp. 5-6, Petition 16, 17)

This Court, however, granted certiorari "limited to the question of the validity of that part of the order of the National Labor Relations Board which directs petitioner to cease and desist from discouraging membership" in the Association and remanded the case for "consideration of the effect of the Labor Management Relations Act of 1947 . . . on the question to which the grant of certiorari is limited." (332 U. S. 480)

The court below—correctly, we believe—rejected the contention that "the mandate of the Supreme Court does not require or permit us to pass upon the constitutionality of the Labor Management Relations Act." It held (R. 329) that "The constitutionality of the Act was put in issue in general terms by the motion of Foreman's Association before the Supreme Court to intervene. . . . We are of the opinion that a consideration of the validity of the order, because of the enactment of the Act, necessarily involves the question of whether the Act is constitutional and valid." (citing cases)

Where the mandate of this Court directs a review of the validity of an order enforcing rights under the original

act, in the light of the effect, upon that order, of the amended act which purports to obliterate the remedy provided by that order and any other remedy for the violation of fundamental rights, we submit that the constitutional validity of the amended act is properly before this Court.

The Board (Board's Brief p. 6) and the Company* (Company's Brief pp. 12-15) also contend that the Railway Labor Act cases (*Texas & N. O. R. R. Co.* v. *Brotherhood*, 281 U. S. 541; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515), relied on by petitioner, are inapposite because "those cases dealt with the enforcement of statutory commands here absent".

The amended act, however, does not eliminate the legislative declaration of the rights of employees or the statutory command that employees are to be protected in the exercise of their rights (Sections 1 and 7 of the amended act, section 2 of the Norris La Guardia Act, Petition pp. 9-10). It purports merely to define the term employee, "when used in this Act" as not to include any individual employed as a supervisor (Section 2(3)) and then to deprive supervisors of all remedies that may be anywhere invoked to protect their constitutionally protected and legislatively guaranteed rights as employees. Under the original act and for purposes of other legislation, supervisors were and are employees, protected by both the legislative guarantee and the administrative provisions of the original act. *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485. The court below held that the amended act did not restrict the fundamental rights of supervisors but "merely changed the statutory method of

* The Company apparently argues that the Board's order involves the collective bargaining provisions of the amended act (Company's brief pp. 10, 13). This is error. The order requires the company to refrain from interference, restraint and coercion and from discriminatory discharges. There is no requirement that it meet and take affirmative action with respect to bargaining with the Association (R. 55, 321).

enforcing those rights." (R. 329) If the change in the statutory method of enforcement had merely deprived supervisors of remedies before the Board, the legislative declaration of their rights having been unchanged, supervisors would have had the same remedies in the federal district courts as were available to complainants in the *Texas* case, *supra*. But Section 14(a) of the amended act deprives supervisors not only of remedies before the Board but of all other remedies for violations of their rights. Under the doctrine of the *Brinckerhoff-Faris, Truax* v. *Corrigan* and *Texas* cases, *supra*, we submit that such a complete deprivation of remedies constitutes a denial of due process.

Respectfully submitted,

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